92-2008

Supreme Court, U.S.
FILED
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No.____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

MAURY HEXAMER,

Petitioner,

v.

JOHNSON CONTROLS, INC.

Respondent,

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Maury Hexamer
Petitioner, pro se
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QUESTIONS PRESENTED FOR REVIEW

DID THE DISTRICT COURT FAIL TO SUBSTANTIALLY JUSTIFY HIS AWARD OF ATTORNEYS' FEES TO JOHNSON CONTROLS FOR PETITIONER'S FILING OF A SECOND ACTION IN HIS COURT: WHERE THE AWARD IS BASED SOLELY ON PER SE LEGAL CONCLUSIONS THAT ARE FATALLY FLAWED FOR OVERBROAD GENERALIZATIONS AND WHERE PETITIONER SUBSTANTIALLY JUSTIFIED AND MAINTAINS HER OPPOSING LEGAL POSITION?

DID THE PANEL ERR IN FAILING TO ACTUALLY REVIEW THE DISTRICT COURT'S AWARD OF SANCTIONS?

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

MAURY HEXAMER,

Petitioner,

v.

JOHNSON CONTROLS, INCORPORATED,

Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES Maury Hexamer, Petitioner herein, Counsel for Ernest Dale Thomas in related proceedings against Johnson Controls, Incorporated, and files this Petition for Writ of Certiorari.

OPINIONS BELOW

The opinion of the Court of Appeals dismissing Petitioner's appeal, is attached hereto as Appendix A. The opinion of the Court of Appeals "affirming" sanctions against Appellant Thomas is attached hereto as Appendix B. The order of the District Court awarding attorney's fees as a sanction against Petitioner is attached hereto as Appendix C.

JURISDICTION OF THE UNITED STATES SUPREME COURT

1. On February 19, 1993 KING, DAVIS, and WIENER, Circuit Judges, United States Court of Appeals for the Fifth Circuit issued a judgement and decree granting the motion of Respondent to dismiss Petitioner's appeal of an award of sanctions against Petitioner.

2. This Petition for Writ of Certiorari is filed within 90 days of the decree dismissing Petitioner's appeal.

3. Petitioner believes that the following statutory provision confers jurisdiction on this honorable Court to review the judgement in question by writ of certiorari: 28 U.S.C. 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article III, Section 1: The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times,

receive for their services, a compensation, which shall not be diminished during their continuance in office.

28 U.S.C. Section 1926:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personaly the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

STATEMENT OF THE CASE

Petitioner represents Ernest Dale Thomas, who was formerly employed by Respondent as a journeyman electrician. Mr. Thomas suffered work-related

injuries; filed a Worker's Compensation claim; was subsequently required to work beyond the restrictions set by his doctor; and terminated in retaliation for filing his compensation claim.

Petitioner filed a prior lawsuit in the same district court on Mr. Thomas' behalf alleging federal-question jurisdiction "...pursuant to 42 U.S.C. Sections 1983 and 1985..." Petitioner based federal jurisdiction on reasoning set forth by Chief Judge Justice in Britt v. Suckle, 453 F.Supp. 987 (E.D. Tex. 1978). Two years later, Respondent filed a Motion to Dismiss on the grounds that pleadings did not state claims under Sections 1983 or 1985.

After finding erosion of the jurisdictional theories in Britt, Petitioner filed related state-law

claims in state court. Petitioner then filed a "Motion to Dismiss for Purposes of Transfer to State Court", suggesting that due to intervening case law; the district court probably lacked subject matter jurisdiction. Petitioner's motion informed the federal court of Mr. Thomas' intention to pursue related state-law claims in state court, and attached a copy of the state court petition. The motions were discussed at a pretrial conference.

Soon thereafter, the district court issued a cryptic order of dismissal, which stated:

> "Came on for consideration the motion of the defendant to dismiss and the motion of plaintiff to dismiss. Having determined that there is no longer any question in this suit as to whether dismissal is proper, it is the Order of this Court that plantiff's claim be dismissed with prejudice."

More than five months after the federal dismissal, Respondent sought summary judgement based on alternative grounds, including a bar of res judicata as a result of the prior federal dismissal. The state trial court granted the motion, without explanation.

Petitioner appealed to the Court of Appeals for the Fifth District of Texas at Dallas which affirmed the judgement of the trial court. The Texas Appellate Court acknowledged that there was some evidence that questionable jurisdiction was a basis for dismissal. It explained its affirmance as based squarely on a[n erroneous and] presumptive construction of the federal dismissal as necessarily barring all subsequent claims, including state-law claims. Petitioner sought but was denied discretionary review in the

Texas Supreme Court and in the instant Court, on behalf of Mr. Thomas: No. 90-7373.

Petitioner filed a second proceeding on Mr. Thomas' behalf in the same district court; within the time period prescribed by Tex. [illegible].Prac. & Rem. Code Sec. 16.064(a); and pursuant to Fed.R.Civ.Proc. Rule 60, to achieve relief from the earlier judgement. Respondent sought summary judgement and sanctions; Petitioner filed opposing motions. The District Court granted Respondent's Motion for Summary Judgement.

Petitioner filed an appeal on behalf of Mr. Thomas of the summary judgement motion. Shortly before Mr. Thomas' brief was due; Respondent's attorneys sent a personal letter to the District Judge (Appendix D) requesting a decision

on the pending motion for sanctions. The district court assessed sanctions against Petitioner, who filed a second appeal on her own behalf.

The Fifth Circuit panel affirmed Mr. Thomas' summary judgement, whereupon Respondent filed a Motion to Dismiss Petitioner's appeal, which was opposed by Petitioner. The same Fifth Circuit panel was assigned to hear the motion to dismiss and granted the motion, without explanation. (Appendix A) A concurrent Petition for Certiorari is being filed by Petitioner on behalf of Mr. Thomas.

ARGUMENT

The district court wrongly claims to have found a per se violation by Petitioner of 28 U.S.C. 1927, because of Petitioner's filing of an independent action raising state-law claims, following the same district court's

prior, jurisdictional dismissal of a federal-question lawsuit. The district court flatly ignored reasonable, compelling legal arguments made by in good faith by Petitioner, on behalf of her client, in opposition to summary judgement. Moreover, the district court applied flawed and prejudicial concept of "res judicata".

Petitioner submits that the district court's own legal reasoning regarding the "...federal law of res judicata..." is fatally flawed. In fact, both the district court and the panel's opinion on summary judgement issues rely EXCLUSIVELY for this principle, on irrelevant dicta in an obscure Fifth Circuit panel decision which is wholly inapposite to the circumstances of the instant case (i.e., Astron v. Indus. Assoc., Inc. v.

Chrysler Motors Corp. 405 F.2d 958 (5th Cir. 1968)).

The district court's legal conclusions are contrary to the plain meaning of an Act of Congress; i.e., Fed.R.Civ.Proc. Rule 41(b). Moreover, the application of res judicata to the Rule 41(b) dismissal at issue in the instant case is precluded by this Court's holding in Costello v. United States, 365 U.S. 265, 5 LEd2 561 (1961). The district court's theory of "prejudicial" res judicata is contrary to relevant, fundamental principles of collateral estoppel and claim preclusion set forth by this Court, in Costello, Montana v. United States, 440 U.S. 147, 59 LEd2 210 (1979), Lytle v. Household Manufacturing, ___U.S.____, 108 LEd2 504 (1990); Migra v. Warren City School Dist. Bd. of Ed., 484 U.S. 75, 70 LEd2

56 (1984); and Atlantic Coast Line R. Co. v. Engineers, 398 U.S. 254, 26 LEd2 234 (1970).

The district court's "post-hoc" construction of his prior dismissal order both ignores language in the order regarding what was considered and what was determined. The district court ignored important legal arguments against applying principles of claim-preclusion to bar state-law claims after dismissal of a federal-question lawsuit. Moreover, the district court even ignored Petitioner's compliance with the spirit of instructions by this Court in Migra v. Warren City School Dist. Bd. of Ed., 484 U.S. 75, 70 LEd2 56 (1984) offered to avoid the possibility of claim-preclusion, albeit in a slightly different context. Thus, Petitioner carefully informed the court

of Plaintiff's intention to pursue related state-law claims which were filed in state court PRIOR to the first dismissal.

The district court also professed to rely alternatively on state law, yet he ignored both Petitioner's citation of Tex.Rev.Civ.Stat. Section 16.064 and the state appellate court's evidentiary finding that the dismissal was partly based on "questionable jurisdiction." Accordingly, state-law would allow the claims to proceed under much the same reasoning employed by this Court in Costello; i.e., because the dismissal by the FIRST trial court would be deemed jurisdictional: Burford v. Sun Oil Co., 188 S.W. 2d 308 (Tx.App.--Austin, 1944) writ ref'd w.o.m. Not surprisingly, the district court was unable to cite any statutory or case law to support his

contrary conclusions. This Court requires the United States Courts of Appeals to provide responsible and de novo review of a district court's professed conclusions of state law: e.g., Salvo Regina College v. Russel, ___ U.S. ___, 113 LEd2 190 (1991). Yet the Court of Appeals panel provided no actual review of state law: either in a prior appeal of the merits of summary judgement issues or in the same panel's wholly unexplained dismissal of the instant appeal.

Petitioner respectfully submits that the harsh treatment of counsel by the district court cannot be justified in terms of the strict construction of 28 U.S.C. Section 1927, required by Roadway Express, Inc. v. Piper, 447 U.S. 752, 65 LEd2 488 (1980).

Moreover, this Court's Rule 11 has not altered the findings required for a determination that Section 1927 authorizes an award of attorneys' fees*.

The district court wholly fails to explain how any unreasonable conduct by Petitioner caused multiplication of proceedings. Moreover, the district court wholly failed to explain how any specific conduct by counsel was unreasonable "...under the circumstances..." ; as required by Rule 11.

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*Ft.#1: Section 1927 was amended by Congress in 1980, subsequent to this Court's decision in Roadway Express, supra, to authorize an award of attorney's fees reasonably incurred because of conduct by an attorney which "...unreasonably and vexatiously..." multiplies the proceedings in any case. Rule 11 was amended in 1983, pursuant to the Rules Enabling Act, 28 U.S.C. 2071: to allow attorney's fees as a sanction for violating an objective standard of "reasonableness under the circumstances."

Business Guides v. Chromatic Comm., ___ U.S. ___, 112 LEd2 1140, 1159 (1991).

The district court's assessment of attorney's fees against Petitioner derives solely from an "...unreflective invocation..."* of res judicata principles to the single act of filing a petition, without consideration of relevant circumstances unique to the instant case.

The district court's labeling of countervailing res judicata arguments as "per se" unreasonable would impermissibly "...freeze doctrine..." in an area of substantive law that has never been clarified by this Court or in any published opinion by the Courts of Appeals. This is not merely an "...incidental..." affect on substantive

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*Ft.#2: Montana v. United States, 59 LEd2 at 223.

rights: e.g., Burlington Northern R. Co., 480 U.S. 1, 94 LEd2 1 (1987)

The doctrinaire application of claim-preclusion where state-law claims are filed with notice to the federal district court, prior to the disposition of federal-question lawsuit: would freeze such doctrine without any examination of the underlying premise that "...the plaintiff could or should have brought [the state-court] claim in the former proceeding...": e.g., Eubanks v. F.D.I.C., 970 F2d 1389 (Fifth Cir. 1992). See Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 92 LEd 898 (1948). The doctrinaire application of a "rule of prejudice" would freeze law in a manner directly contrary to Congressional intent, as ascertained by this Court in Costello, supra.

The District Court clearly erred in awarding attorneys' fees to Respondent based solely on his determination that Petitioner's filing of an Original Petition on behalf of Mr. Thomas was foreclosed "...by the law of res judicata." The district court's actions against Petitioner were not "...substantially justified..." where they were based solely on a view of the law which is both doctrinaire and "...founded fatally on overbroad generalizations..." in a complex, unsettled and special area of "...the law of res judicata..."

The District Court also erred in granting Respondent's request for additional sanctions in the event of an appeal; an action clearly designed to "...chill all but the bravest litigants from taking an appeal...": Cooter &

Gell, 110 LEd2 at 383: contrary to this Court's rule in Cooter & Gell against a district court's assessment of sanctions for a Rule 11 appeal. Moreover, the panel failed to provide any actual clarification or independent review of the district court's underlying legal conclusions.

This Court has pointed out "...the difficulty in distinguishing between factual and legal issues..." Cooter & Gell, supra, 110 LEd2 at 379. Yet, in the instant case the district court's award of attorney's fees against Petitioner squarely rested on legal conclusions: i.e., "...on a materially incorrect view of the relevant law in determining that [Mr. Thomas'] pleading was not 'warranted by existing law or a good-faith argument for changing that law.'" This Court pointed out that

"...if a district court's findings rest on an erroneous view of the law, they may be set aside on that basis." 110 LEd2 at 380.

Petitioner respectfully submits that where the district court assessed sanctions based solely on a materially incorrect and erroneous view of the relevant law, the award not only may, but MUST be set aside on that basis. The district court's legal conclusions on the merits should not have been granted the deference clearly implied by the actions taken by the Court of Appeals panel.

This Court pointed out regarding issues of state-law, its "...[firm] conviction that the difference between a rule of deference and the duty to exercise independent review is 'much more than a mere matter of degree' [cite

omitted]...When de novo review is compelled, no form of appellate deference is acceptable." Salvo, supra, 113 LEd2 at 202.

Petitioner respectfully submits that, if allowed to stand; the instant case would set a dangerous precedent which could threaten the integrity of the federal courts. Use of sanctions to penalize a legal position rejected by the district court serves no legitimate purpose and will not deter conduct which offends the Court. Moreover, it will add to the burdens of the federal courts by deterring counsel from ever acquiescing in a jurisdictional dismissal; by forcing counsel to file state-law claims in federal court, even in a federal-question lawsuit and by forcing clarifying appeals for dismissals which, while lacking clarity; necessarily imply

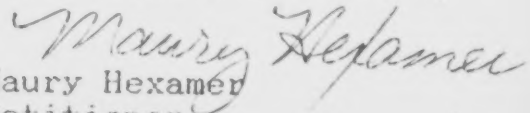
dismissal for lack of jurisdiction.

The complex, fundamental; constitutional, statutory, federal common-law and state-law issues presented by Petitioner on behalf of Mr. Thomas, are exceptionally worthy of review. A truly independent review of the district court's underlying legal conclusion will not only vindicate the objective reasonableness of Petitioner's legal position; such a review will preclude any basis for sanctions.

CONCLUSION

For the foregoing reasons, Petitioner respectfully petitions this honorable Court to grant a writ of certiorari to review the questions presented herein.

Respectfully submitted,



Maury Hexamer
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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 92-4825

ERNEST DALE THOMAS,
Plaintiff,
versus

JOHNSON CONTROLS, INC.,
Defendant-Appellee,

versus
MAURY MARLENE HEXAMER,
Appellant,

Appeal from the United States District Court for the Eastern District of Texas

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Before KING, DAVIS and WIENER, Circuit Judges,

BY THE COURT:

IT IS ORDERED that the motion of appellee to dismiss the appeal is granted.

IT is FURTHER ORDERED that appellee's alternative motion to waive the filing of a brief is denied as moot--

WED
CDK
JIW
2-18-93

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-4561
Summary Calendar

ERNEST DALE THOMAS,
Plaintiff-Appellant,

VERSUS

JONHSON CONTROLS, INC.,
Defendant-Appellee.

Appeal from
the United States District Court
for the Eastern District of Texas
(91-CV-123)

Before KING, DAVIS and WIENER,

Circuit Judges.

PER CURIAM:[1]

Thomas has filed three suits against his former employer, Johnson Controls,

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[1]Local Rule 47.5 provides: "The publication of opinions that have no

Inc., for wrongful termination of his employment. The first suit was filed in 1985. The federal district court dismissed that suit with prejudice in April 1987. Thomas filed a substantially identical suit against Johnson Controls in Texas state court. The Texas district court dismissed that suit with prejudice as barred by res judicata. The intermediate Texas Court of Appeals affirmed that decision and the Texas Supreme Court denied writs. The United States Supreme Court denied plaintiff's application for writ of

1[cont'd] precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal provssion." Pursuant to that Rule, the Court has determined that this opinion should not be published.

certiorari from the state court judgement. Thomas then returned to federal court and filed the third, instant suit against Johnson Controls, again seeking damages for wrongful discharge. The district court dismissed the suit as barred by res judicata and as time-barred. The district court also assessed sanctions against Thomas.

The district court's judgement is plainly correct. Thomas's arguments on appeal are incoherent. Thomas argues that the federal court was without jurisdiction in Thomas I to hold an adjudication on the merits. Thomas offers no coherent reason why the district court had no jurisdiction to entertain Thomas I, since the district court clearly had diversity jurisdiction. Also, Thomas does not

explain why the district court now has jurisdiction over the identical claim he asserted in Thomas I. The district court in Thomas I dismissed the suit with prejudice, and that dismissal constituted a final judgement on the merits. See Astron Indus. Associates, Inc. v. Chrysler Motors, Corp., 405 F.2d 958, 960 (5th Cir. 1968); see also Fed.R.Civ.P. 41(b). Such a final judgment bars a later suit on the same cause of action. Astron, 405 F.2d at 960.

Thomas, in his effort to collaterally attack the state court judgement in Thomas II, next asserts that the federal district court's application of state res judicata principles is erroneous. This is also plainly wrong. The federal district court in this diversity case properly applied state res judicata

principles in determining whether the state court's judgement in Thomas II barred plaintiff's action in Thomas III. See Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 81 (1984).

Finally, the District court correctly imposed sanctions. Two state courts definitively stated that Thomas's claim was barred by the federal court's dismissal with prejudice in Thomas I. He had no arguable legal basis to return to federal district court and attempt to collaterally attack both the judgement rendered by the federal district court and the judgement rendered by the state court.

This appeal is even more frivolous. The federal district court, in a simple, concise order, gave reasons explaining why Thomas's action was barred by the

earlier judgements. Thomas's persistence in continuing this vexatious litigation and filing a frivolous appeal in which "the argument s of error are wholly without merit," prompts us to grant appellee's motion for additional sanctions. See Buck v. United States, 967 F.2d 1060, 1062 (5th Cir. 1992)(per curiam)(quoting Coghlan v. Starkey, 852 F.2d 806, 911 (5th Cir. 1988)(per curiam). Fed. R. App. P. 38 authorizes an award of just damages and single or double costs to the appellee for frivolous appeals. We find that an award of $3000 in lieu of costs and attorney's fees is reasonable, and we award damages in that amount in favor of Johnson Controls and against Thomas.

APPEAL DISMISSED. See Local Rule 42.2

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

ERNEST DALE THOMAS,)
)
v.) *
)
JOHNSON CONTROLS, INC.)

*CIVIL ACTION NO. 4:91cv123

ORDER

Pending before the Court is Johnson Controls, Inc.'s Motion for Sanctions, and having considered the motion, and the response thereto, the Court is of the opinion that the motion should be granted.

In 1985, plaintiff filed suit in this Court alleging that Johnson Controls, Inc. ("Johnson Controls") terminated his employment in violation of the Texas Workers' Compensation Act. This Court dismissed the 1985 action with prejudice in April 1987.

Plaintiff, represented by the same counsel, then filed the identical suit against defendant in state court. The state court suit was also dismissed with prejudice. The state court dismissal was affirmed on appeal. Plaintiff and the same counsel filed a third lawsuit against defendant in this Court fo wrongful discharge. Plaintiff also alleged a claim for gross negligence. On April 24, 1992, the Court granted defendant's Motion for Summary Judgement on the grounds of res judcata. Johnson Controls alleges that plaintiff has violated Fed. R. Civ.P. 11 and 28 U.S.C. Section 1927 because plaintiff's third lawsit was clearly barred by res judicata.

Whether the plaintiff or plaintiff's counsel should be sanctioned under Rule

11 is governed by Thomas v. Capital Sec. Services, Inc., 836 F.2d 866 (5th Cir. 1988)(en banc). This opinion confirms the following affirmative duties imposed by Rule 11:

(1) That the attorney has conducted a reasonable inquiry into the facts which support the document;

(2) That the attorney has conducted a reasonable inquiry into the law such that the document embodies existing legal principles or a good faith argument for the extension, modification or reversal of existing law: and

(3) That the motion is not interposed for purposes of delay, harassment or increasing cost of litigation.

Plaintiff's counsel signed one pleading which must be examined to determine whether Rule 11 was violated. This pleading is plaintiff's Original Petition. Plaintiff and plaintiff's counsel filed the third lawsuit knowing that this Court had dismissed with prejudice plaintiff's 1985 federal

lawsuit alleging wrongful discharge and that the state district court had also dismissed a second identical suit filed by plaintiff's counsel. Despite this knowledge, plaintiff's counsel signed and filed the Original Petition on July 12, 1991. Thus, the Court finds that plaintiff's counsel violated Rule 11 when she signed the Original Petition. If she had made an investigation into the law of res judicata, the Court does not see how she could have reasonably concluded that plaintiff's claims were not barred by res judicata. This Court also finds that plaintiff's counsel has violated Section 1927 in that plaintiff's counsel continued to prosecute unreasonably and vexatiously a lawsuit that she lost in two prior proceedings.

Having found a violation of Rule 11 and Section 1927, the Court must decide the appropriate sanction. The imposition of a sanction is mandatory, but the sanction must, however, be the least severe necessary to accomplish the purpose of the sanction. The purpose of a sanction is twofold: deterrence and compensation. Plaintiff's counsel has flagrantly violated the standards of Rule 11 and 28 U.S.C. Section 1927. Defendant has incurred reasonable and necessary attorneys' fees in defending the three causes of action in the total amount of $42,569 and expenses in excess of $4,000. In defending the most recent suit in this Court, defendant has incurred reasonable and necessary attorney's fees in the amount of $4,100 and expenses in the amount of $160. The

sanction is this case which is consistent with the purpose of Rule 11 and 28 U.S.C. Section 1927 is for plaintiff's counsel, Maury Hexamer, to pay the sum of $6000 to defendant, Johnson Controls, as compensation for their attorney's fees and expenses and to deter counsel from initiating this type of lawsuit in the future.

It is, therefore, ORDERED that defendant's Motion for Sanctions in hereby GRANTED and plaintiff's counsel, Maury Hexamer, shall, on or before fifteen (15) days from the date of the signing of this order, pay to defendant the sum of $6000.

Signed this 27th day of July, 1992.

Paul Brown

UNITED STATES DISTRICT JUDGE

Mld 7-29-92 to: Hexamer
Schaner
Wilson
C-6